

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREW E. ARMSTRONG,

Plaintiff,

vs.

B. CURRY, Warden, et al.,

Defendants.

No. C 07-6251 JF (PR)

ORDER OF PARTIAL
DISMISSAL AND OF
SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against Correctional Training Facility personnel. Plaintiff has been granted leave to proceed in forma pauperis in a separate written order. The Court will dismiss certain claims and order service of the cognizable claims on the remaining Defendants.

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a

1 claim upon which relief may be granted or seek monetary relief from a defendant who is
2 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
3 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
4 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
6 elements: (1) that a right secured by the Constitution or laws of the United States was
7 violated, and (2) that the alleged violation was committed by a person acting under the
8 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

9 Having reviewed the complaint, the Court finds that Plaintiff's allegations,
10 liberally construed, state cognizable claims that Defendants Chudy, Grewal, Morris and
11 Ulanday violated his Eighth Amendment rights by acting with deliberate indifference to
12 his serious medical needs.

13 Plaintiff also names the CTF Warden, B. Curry, as a defendant, but makes no
14 allegations against him. The simple fact that he is the Warden does not suffice to plead a
15 § 1983 claim, however, because only those individual officials who actually engage in
16 unlawful conduct can be held liable. See Monell v. Dep't of Social Servs., 436 U.S. 658,
17 690 (1978) (rejecting concept of respondeat superior liability in § 1983 context and
18 requiring individual liability for constitutional violation); Taylor v. List, 880 F.2d 1040,
19 1045 (9th Cir. 1989) (holding personal participation required for finding of supervisorial
20 liability based on alleged constitutional violations). Accordingly, the claims against
21 Defendant Curry will be dismissed for failure to state a cognizable claim for relief against
22 him.

23 CONCLUSION

24 For the reasons stated above, the Court orders as follows:

- 25 1. All claims against Defendant B. Curry are DISMISSED.
- 26 2. The Clerk of the Court shall issue summons and the United States Marshal
27 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
28 attachments thereto, and a copy of this order upon the named Defendants: **Dr. J. Chudy,**

1 **Dr. I. Grewal, Dr. Ulanday, and Nurse I. Grewal** at the **Correctional Training**
 2 **Facility in Soledad, California.** The Clerk shall also mail courtesy copies of the
 3 complaint and this order to the California Attorney General's Office.

4 3. No later than **ninety (90) days** from the date of this order, Defendants shall
 5 file a motion for summary judgment or other dispositive motion with respect to the claim
 6 in the complaint as set forth above.

7 a. If Defendants elect to file a motion to dismiss on the grounds that
 8 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
 9 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
 10 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
 11 Terhune, 540 U.S. 810 (2003).

12 b. Any motion for summary judgment shall be supported by adequate
 13 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
 14 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
 15 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**
 16 **the opinion that this case cannot be resolved by summary judgment, he shall so**
 17 **inform the Court prior to the date the summary judgment motion is due.**

18 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
 19 and served on Defendants no later than **thirty (30) days** from the date Defendants'
 20 motion is filed.

21 a. In the event Defendants file an unenumerated motion to dismiss
 22 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

23 The Defendants have made a motion to dismiss pursuant to Rule
 24 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
 25 exhausted your administrative remedies. The motion will, if granted, result
 26 in the dismissal of your case. When a party you are suing makes a motion
 to dismiss for failure to exhaust, and that motion is properly supported by
 declarations (or other sworn testimony) and/or documents, you may not

27 ¹The following notice is adapted from the summary judgment notice to be given to pro se
 28 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 simply rely on what your complaint says. Instead, you must set out specific
 2 facts in declarations, depositions, answers to interrogatories, or documents,
 3 that contradict the facts shown in the Defendant's declarations and
 4 documents and show that you have in fact exhausted your claims. If you do
 5 not submit your own evidence in opposition, the motion to dismiss, if
 6 appropriate, may be granted and the case dismissed.

7 b. In the event Defendants file a motion for summary judgment, the
 8 Ninth Circuit has held that the following notice should be given to Plaintiffs:

9 The defendants have made a motion for summary judgment by
 10 which they seek to have your case dismissed. A motion for summary
 11 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
 12 granted, end your case.

13 Rule 56 tells you what you must do in order to oppose a motion for
 14 summary judgment. Generally, summary judgment must be granted when
 15 there is no genuine issue of material fact--that is, if there is no real dispute
 16 about any fact that would affect the result of your case, the party who asked
 17 for summary judgment is entitled to judgment as a matter of law, which will
 18 end your case. When a party you are suing makes a motion for summary
 19 judgment that is properly supported by declarations (or other sworn
 20 testimony), you cannot simply rely on what your complaint says. Instead,
 21 you must set out specific facts in declarations, depositions, answers to
 22 interrogatories, or authenticated documents, as provided in Rule 56(e), that
 23 contradict the facts shown in the defendants' declarations and documents
 24 and show that there is a genuine issue of material fact for trial. If you do
 25 not submit your own evidence in opposition, summary judgment, if
 26 appropriate, may be entered against you. If summary judgment is granted
 27 in favor of defendants, your case will be dismissed and there will be no
 28 trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
 evidence showing triable issues of material fact on every essential element of his claim).
 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

5. Defendants shall file a reply brief no later than **fifteen (15) days** after
 Plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due.

1 No hearing will be held on the motion unless the Court so orders at a later date.

2 7. All communications by the Plaintiff with the Court must be served on
3 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
4 copy of the document to Defendants or Defendants' counsel.

5 8. Discovery may be taken in accordance with the Federal Rules of Civil
6 Procedure. No further Court order is required before the parties may conduct discovery.

7 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
8 Court informed of any change of address and must comply with the Court's orders in a
9 timely fashion. Failure to do so may result in the dismissal of this action for failure to
10 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

11 IT IS SO ORDERED.

12 DATED: 5/8/08


JEREMY FOGEL
United States District Judge